NO. 85-1500

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

# In the Supreme Court of the United States

October Term, 1985

ROLAND V. ACOSTA,
PETITIONER

VERSUS

THE LOUISIANA DEPARTMENT OF HEALTH AND HUMAN RESOURCES: MR. GEORGE FISCHER, HEAD OF THE DEPARTMENT OF HEALTH AND HUMAN RESOURCES: MR. CHARLES OLIVIER, ADMINISTRATOR OF THE SOUTH LOUISIANA MEDICAL CENTER IN HOUMA, LOUISIANA: AND WAYNE HEAP, ASSISTANT SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN RESOURCES,

RESPONDANTS

## SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Appendix F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

| | |
|---|---|
| ROLAND L. ACOSTA | CIVIL ACTION |
| versus | NO. 81-3930 |
| THE LOUISIANA DEPARTMENT OF HEALTH & HUMAN RESOURCES, ET AL | SECTION "J"(4) |

## AMENDED FINDING AND RECOMMENDATION

Portions of this magistrate's Finding and Recommendation filed May 16, 1984, are hereby amended as follows:

### FINDINGS

12. The "lodestar" amount of $19,953.75 is a reasonable fee considering all of the above factors.

### RECOMMENDATION

It is recommended that the amount of $19,953.75 in attorney's fees be awarded to the defendants.

Failure to file written objections to the proposed findings and

recommendations contained in this report within ten days from the date of its service shall bar an aggrieved party from attacking the factual findings on appeal. Nettles v. Wainwright, 677 F.2d 404 (5th Cir. 1982).

New Orleans, Louisiana, May 21, 1984

RONALD A. FONSECA
United States Magistrate

Appendix G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

| | |
|---|---|
| ROLAND L. ACOSTA | CIVIL ACTION |
| versus | NUMBER 81-3930 |
| LOUISIANA DEPARTMENT OF HEALTH & HUMAN RESOURCES, ET AL | SECTION "J"(4) |

## FINDING AND RECOMMENDATION

This matter was referred to the undersigned United States magistrate by the Honorable Patrick E. Carr, United States District Judge, for determination of reasonable attorney's fees to be awarded to the defendants.

## STATEMENT OF THE CASE

Plaintiff, Roland L. Acosta, filed this civil action on September 29, 1981, against defendants, Louisiana Department of Health and Human Resources; Charles Oliver, Administrator of the South Louisiana Medical Center; and Wayne

Heap, Assistant Secretary of the Department of Health and Human Resources. Jurisdiction was alleged under 28 U.S.C ?1343, the First and Fourteenth Amendments of the United States Constitution, and 42 U.S.C ??1983 and 1985.

Judgment was entered in favor of the defendants on December 20, 1982 pursuant to defendants' motions to dismiss. Defendants subsequentlly filed a motion for attorney's fees, alleging that plaintiff's complaint was filed in subjective bad faith. Oral argument was heard before Magistrate Eileen Gleason Shaver on July 1, 1983. On July 28, 1983, Magistrate Shaver recommended that such motion be denied. Defendants filed a motion for review of the Magistrate's findings, which was argued before the District Judge on September 28, 1983. In his reasons issued April 10, 1984,

the Judge failed to adopt the Magistrate's findings, which was argued before the District Judge on September 28, 1983. In his reasons issued April 10, 1984, the Judge failed to adopt the Magistrate's findings. The Judge determined that the defendants were entitled to attorney's fees, and referred the matter to the undersigned Magistrate for determination of the amount to be awarded.

At the conference held before this Magistrate on May 3, 1984, counsel for both parties agreed that an evidentiary hearing was not necessary. Counsel for plaintiff stipulated that if a hearing was held, the defendants' witnesses would testify in accordance with the affidavits submitted.

## FINDINGS

1. In determining the amount of attorney's fees to be awarded, the first

step is to determine the number of hours reasonable expended and multiply by a reasonable hourly rate. Hensley v. Eckerhard, ___ U.S.___, 103 S.Ct. 1933, ___ L.Ed.2d___ (1983).

2. The affidavits submitted by counsel for the defendants demonstrate that a total of 234.75 hours were expended in defense of this claim.

3. Those hours were reasonably expended by counsel for the defendants in the defense of this claim.

4. The affidavits submitted by counsel for defendants indicate that the hourly rate in private practice for legal services of this nature would be $85.00 per hour.

5. This Magistrate finds that $85.00 per hour is reasonable hourly rate for services rendered by counsel for the defendants.

6. The calculation of hours reasonably expended multiplied by a reasonable hourly rate represents a "lodestar" amount of $19,953.75.

7. The district court may adjust the "lodestar" amount of attorney's fees upward or downward depending upon the evaluation of various factors. Hensley v. Eckerhart, supra; Graves v. Barnes, 700 F.2d 220 (5th Cir. 1983); Copper Liquor, Inc. v. Adolph Coors Co., 684 F.2d 1087 (5th Cir. 1982) (Cooper Liquor III); Cooper Liquor, Inc. v. Adolph Coors Co., 624 F.2d 575 (5th Cir. 1980) (Cooper Liquor II).

8. The lodestar may be adjusted to reflect the contingent nature jof the suit and the quality of representation. Graves v. Barnes, supra, at 222. (citing Copper Liquor III, supra, at 1093); Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 2980).

9. Factors to be considered in analyzing the "contingent nature of success" are: the plaintiff's burden, reflected in the complexity of the case, probability of defendant's liability, and difficulty in proving damage claims; the risks assumed, such as hourse of labor without guaranteed remunderation, out-of-pocket expenses, and prior expertise in the field; and delay in receipt of payment for services rendered. Graves v. Barnes, supra, at 222-23; Lindy Bros. Builders, Inc. v. American Radiator and Standard Sanitary Corp. 540 F.2d 102 (3rd Cir. 1976)(enbanc) (Lindy II).

10. Factors to be taken into account with respect to the "quality of representation" are: the results obtained, evaluated in terms of potential money damages available and benefit conferred on a class; and an

evaluation of professional methods uses. Graves v. Barnes, supra at 223; Lindy II, supra at 117-18; Merola v. Atlantic Richfiled co., 515 F.2d 164, 168-69 (3rd Cir. 1975) (Merola II).

11. There has been no showing by the parties which would support the increase or decrease of the "lodestar" in consideration of the above-stated factors.

12. The "lodestar" amount of $19,953.75 is a reasonable fee considering all of the factors discussed and the extent of success of the plaintiff.

RECOMMENDATION

It is recommended that the amount of $19,953.75 in attorney's fees be awarded to the plaintiff.

Failure to file written objections to the proposed findings and recommendations contained in this report

within ten days from the date of its service shall bar an aggrieved party from attacking the factual findings on appeal. Nettles v. Wainwright, 677 F.2d 404 (5th Cir. 1982).

New Orleans, Louisiana, May 16, 1984.

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RONALD A. FONSECA

United States Magistrate

Appendix H

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

| | |
|---|---|
| ROLAND L. ACOSTA | CIVIL ACTION |
| versus | NUMBER 81-3930 |
| LOUISIANA DEPARTMENT OF HEALTH AND HUMAN RESOUCRES, ET AL | SECTION "J"(4) |

FINDING AND RECOMMENDATION

This matter was referred to the undersigned United States Magistrate for determination of Defendants' Motion for Attorneys' Fees. Oral argument was heard on July 1, 1983, whereupon the matter was taken under submission

STATEMENT OF THE CASE

Plaintiff, Roland L. Acosta, filed his action on September 29, 1981 against defendants, Louisiana Department of Health and Human Resources, George Fischer, Head of the Department of

Health and Human Resources, Charles Olivier, Administrator of the South Louisiana Medical Center and Wayne Heap, Assistant Secretary of the Department of health and Human Resources.

Jurisdiction was alleged under 28 U.S.C. 1343, the First and Fourteenth Amendments and 42 U.S.C. ??1983 and 1985.

Plaintiff claimed that while he was employed at the South Louisiana Medical Center in Houma, Louisiana, he became aware of various illegal or unethical acts committed by defendants, Olivier and Heap, and that he reported these acts to defendant, George Fischer, in May 1980. Subsequently, he claims to have been harassed, made the subject of false charges and, finally, discharged in August, 1980.

Plaintiff sought damages for injury to reputation, mental anguish, embarrassment and humiliation, loss of

income and punitive damages. Plaintiff also sought reinstatement.

Defendants filed a Rule 12 (b) (6) motion to dismiss, which was granted as to the Section 1985 claim only.

Discovery commenced and plaintiff's counsel took the deposition of defendant, Charles Olivier, who was plaintiff's immediate supervisor. The deposition was taken on May 26, 1982. plaintiff noticed no other depositions.

On November 8, 1982, defendants filed a motion to dismiss the complaint against defendant, Department of Health and Human Resources, on the ground of Eleventh Amendment immunity, to dismiss the complaint against defendants, George Fischer and Wayne Heap, because respondeat superior is not a viable theory of liability under 42 U.S.C. 1983 and plaintiff had not alleged any actions by these defendants in

connection with his discharge, and to dismiss the claims for punitive damages against defendants, Department of Health and Human Resources, Fischer and Heap, under the theory of City of Newport v. Fact Concerts, Inc. ___U.S.___, 101 S.Ct. 2748 (1981).

Defendants simultaneously filed a motion for summary judgment alleging that plaintiff's complaint that he was discharged for exercise of his First Amendment rights was impossible because of the sequence of events set forth in affidavits attached to the motion.

Plaintiff filed no written opposition to any of the motions. Plaintiff's counsel failed to appear at oral argument on the motions before the District Judge on November 24, 1982. The judge granted the substantive motions dismissing the complaint in its entirety. The motion seeking dismissal

on the basis of failure to comply with a discovery order was dismissed as moot. Judgment was entered on December 20, 1982.

On January 26, 1983, plaintiff's counsel filed a notice of appeal. Defendants moved to dismiss the appeal as untimely. Plaintiff's counsel failed to oppose the motion to dismiss the appeal and it was granted by the Fifth Circuit.

Defendants then filed this motion for attorneys' fees, alleging that plaintiff's complaint was filed in subjective bad faith, that it was groundless because contrary to well-settled law and was factually impossible. In support of the motion for attorney's fees, defendants submitted affidavits of three attorneys indicating that they had expended a total of 134.75 hours in defense of the

action. Other affidavits were submitted in support of a request for an hourly rate of $85.00 in attorneys' fees.

FINDING OF FACT

1. Plaintiff filed this action in the belief that various personnel actions of the defendants were taken in retaliation for his exercise of his First Amendment rights. There is no evidence that plaintiff was in subjective bad faith at the outset of the action.

2. Plaintiff's counsel has confessed error of law in filing claims under 42 U.S.C 1985. However, that aspect of the case was quickly dismissed by the Court on a Rule 12 motion.

3. Plaintiff's counsel also confessed error of law in filing a claim for punitive damages against defendants, Heap and Department of Health and Human Resoucres. That aspect of the case, therefore, was groundless when filed.

4. Plaintiff's counsel has confessed that the claim against defendant, Heap, was without merit and properly dismissed inview of the fact that discovery revealed no direct involvement by that defendant in the employment actions of which plaintiff complained. It cannot be said, however, that the claim against defendant, Heap, was groundless when filed, despite the fact that subsequent discovery revealed no basis of liability of his part.

5. Plaintiff's counsel also argues that despite the dismissal of the claim against defendant, Fischer, on the basis of lack of direct involvement, plaintiff had a valid claim that defendant, Fischer, improperly disclosed the information plaintiff told him in confidence. That allegation was not asserted in the complaint or in opposition to the motion for summary

judgment and, therefore, that theory of liability may not properly be considered.

6. Despite the fact that various claims were either groundless when filed or later appeared to be unsupportable, the heart of this case was the claim under 42 U.S.C. 1983 against defendant, Charles Olivier. Mr. Olivier was plaintiff's immediate supervisor.

7. Plaintiff claimed that Mr. Olivier took various actions against him in retaliation for his complaining to defendant, Fischer, in May, 1980 concerning various activities of Mr. Olivier. Specifically, plaintiff claimed Mr. Olivier assigned him to the night shif, instituted an investigation into plaintiff's alleged misuse of state vehicles, suspended and ultimately terminated his employment, all in response to his allegations of wrongdoing.

8. The affidavits in support of the motion for summary judgment, which were uncontroverted, established that the decision to transfer plaintiff to the night shift was made and communicated to plaintiff prior to the date he allegedly made his charges against Mr. Olivier. The investigation into his alleged misuse of state vehicles also was in progress before he made his complaints. Therefore, neither the transfer nor the investigation into plaintiff's alleged misuse of state vehicles could have been responses to his complaint of wrongdoing.

9. However, it appears that plaintiff did not know that any investigation of his misuse of state vehicles was underway at the time he made his charges of misconduct against Mr. Olivier. He learned of his suspension and termiantion only after he

registered his complaints and sincerely believed that there was some casual connection.

10. In short, plaintiff failed to oppose the summary judgment on the civil rights claim against defendant, Olivier, not because he conceded his claim was without merit but becuase he felt he would be unable to bear the burden or proof at trial.

11. Plaintiff's claims were not brougt in bad faith and were not, as a whole, frivolous, unreasonable or groundless and plaintiff should not be charged with attorneys' fees simply because he refrained from dismissing a case he believed was meritorious but feared he could not prove.

12. A plaintiff should not be assessed his opponent's attorneys' fees unless the Court finds his claim was frivolous, unreasonable or groundless,

or that the plaintiff continued to litigate after it clearly became so. Christianburg Garment co. v. EEOC, 434 U.S. 412, 98 S.Ct., 694, 54 L.Ed.2d 648 (1977).

RECOMMENDATION

It is recommended that the motion for attorneys' fees be DENIED.

Failure to file written objections to the proposed findings and recommendations contained in the report within ten days from the date of its service shall bar an aggrieved party from attacking the factual findings on appeal. Nettles v. Wainwright, 677 F.2d 404 (5th Cir. 1982).

New Orleans, Louisiana, July 28, 1983.

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EILEEN GLEASON SHAVER

United States Magistrate

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that I have this 31st day of March 1986, served a copy of the foregoing pleading on counsel for all parties to this proceeding, by mailing same by United States Mail, properly addressed, first class postage prepaid.